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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1930

AARON PRUSSIAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The charge of the trial court to the jury appears at pages 89–92 of the Record. The opinion of the Circuit Court of Appeals (R. 104) is reported in 42 F. (2d) 854.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 7, 1930. (R. 107.) The petition for certiorari was filed September 11, 1930, and granted October 20, 1930. (R. 108.) The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In its order granting the writ of certiorari, the Court directed that "the briefs and argument * * * be limited to the question whether the indictment states an offense under the criminal code." (R. 108.)

In discussing this question the Government contends—

(1) That the indictment states an offense under Section 148 of the Criminal Code;

(2) That it states an offense under Section 29 of the Criminal Code.

STATUTES INVOLVED

These are printed in the Appendix, pp. 18–19, *infra*.

STATEMENT

The petitioner was convicted in the District Court for the Eastern District of New York on the first count of an indictment which charged him with forging by way of endorsement the name of the payee of a Government draft for $9,044.37, given as a refund of Federal income taxes. (R. 5–7, 93.) He was sentenced to pay a fine of $200 and to serve five years in the penitentiary. (R. 94.) The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. (R. 107.)

The indictment alleges (R. 5–6) that the defendant did—

> unlawfully, wilfully, knowingly and feloniously, falsely make, forge and alter a certain

obligation of the United States, to wit: the endorsement on a draft for payment of money, for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money, to wit: Nine thousand forty-four dollars and thirty-seven cents ($9,044.37) * * * [here follows a copy of the draft and endorsement] by falsely making and forging the name of the payee, to wit: the words "Malcolm S. Mackay" on the back of said draft for money; that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148, U. S. C. C.).

SUMMARY OF ARGUMENT

The indictment states an offense under Section 148 of the Criminal Code, which provides that "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined * * *." The words "obligation or other security of the United States" are defined by Section 147 of the Criminal Code as including "checks, or drafts for money drawn by or upon authorized officers of the United States." The draft involved in the instant case is admitted by petitioner to be an "obli-

gation or other security of the United States." It was drawn on a form approved by the Comptroller of the Treasury and was payable "to order." On the back of the check was a direction requiring it to be endorsed by the person in whose favor it was drawn. Although there is a direct conflict of authority as to whether an endorsement on a draft of the Government comes within the provisions of Section 148, we submit that the sounder view is that of the courts which hold that it does.

The indictment also states an offense under Section 29 of the Criminal Code, which provides: "Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money * * * shall be fined * * *." The indictment here alleges that the petitioner forged an endorsement "for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money * * * with intent then and there and thereby to defraud" in violation of Section 29 of the Criminal Code. We submit that the only doubtful question is whether an endorsement on a check is an "order * * * or other writing" within the meaning of this section. Many cases in the lower courts have held that it is, although some courts have reached the contrary conclusion.

ARGUMENT

I

THE INDICTMENT STATES AN OFFENSE UNDER SECTION 148 OF THE CRIMINAL CODE

The Circuit Court of Appeals so held in the instant case.

Section 148 of the Criminal Code (p. 18, *infra*) provides that "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined," etc. The words "obligation or other security of the United States" are defined in Section 147 of the Criminal Code (p. 18, *infra*) as including "checks, or drafts for money, drawn by or upon authorized officers of the United States."

The draft involved in the instant case is admitted by petitioner to be an "obligation or other security of the United States." (Br. p. 3.)

Sections 147 and 148 were originally enacted as Sections 10 and 13 of the Act of June 30, 1864, c. 172, 13 Stat. 218, 221, 222. Section 10 covered not only the forging of obligations and securities of the United States but also the passing, uttering, publishing, etc., of such obligations and securities. The forgery portion of the section was carried into the Revised Statutes as Section 5414. Section 13, defining the words "obligation or other security of the United States," became Section 5413 of the Revised Statutes. Section 5413 was incorporated into the

Criminal Code as Section 147, and Section 5414 as Section 148, without material change.

No case presenting the question whether forgery of an endorsement upon a Government obligation constituted forgery of the obligation itself appears to have arisen under the statute until 1888. In that year in *United States* v. *Jolly,* 37 Fed. 108, which involved the forgery of the endorsement of a payee's name upon a post-office warrant, the District Court for the Western District of Tennessee held that such a forgery constituted a violation of Section 5414 of the Revised Statutes. The court said (p. 110):

> The next objection is that the indictment is only for the forgery of an *indorsement* upon the post-office warrant, which is not within the Revised Statutes, § 5414, but is at most only a common-law or state offense, of which this court has no jurisdiction. This is a very narrow view of the statute, and trims it to dimensions that would very materially impair its usefulness, and leave the obligations and securities of the United States at the mercy of forgers and counterfeiters. I do not comprehend why the name of the payee is not as much a part of the instrument as that of him who, in behalf of the United States, signs the warrant or check. It is conceded that it is so, as appearing on the face of the instrument, but it is denied that it so when placed on the back of it, because, it is urged that it is then a mere private writing used for a purpose wholly independ-

> ent of the warrant, and only to pass title to it; and that it is no more forgery than it would be to hand the warrant over to another, if it were payable to bearer, as it might be, and pass it by mere delivery. * * * The very fact that the warrant is made payable "to order," rather than "to bearer," when it would pass by delivery, like a bank-note, shows that the practice of so writing them is intended to bring the indorsement within the protection of the law against forgery. It constitutes about all the value there is in so writing them, and the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself.

This decision has been followed by the Circuit Court of Appeals for the Fifth Circuit in *De Lemos* v. *United States*, 91 Fed. 497, and *Hamil* v. *United States*, 298 Fed. 369, 371, and by the Circuit Court of Appeals for the Ninth Circuit in *Alvarado* v. *United States*, 9 F. (2d) 385, 386. The *De Lemos* case involved Section 5414 of the Revised Statutes and the two later decisions involved Section 148 of the Criminal Code.

Opposed to this line of decisions are two cases decided by the Circuit Court of Appeals for the Eighth Circuit, *Gesell* v. *United States*, 1 F. (2d) 283, 288, and *Lewis* v. *United States*, 8 F. (2d) 849,

and a case decided by the Circuit Court of Appeals for the Tenth Circuit, *White* v. *Levine*, 40 F. (2d) 502. See also *United States* v. *Albert*, 45 Fed. 552 (C. C. N. D. Fla.) The *ratio decidendi* in these cases is that the indorsement forms no part of the "obligation."

We submit that the sounder view is that expressed in the group of cases first cited. It is noteworthy that here the draft was payable "to the order of" Malcolm S. Mackay and that on the back of the draft as issued appeared a form approved by the Comptroller of the Treasury, which stated: "This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn." (R. 6.) Consequently, indorsement by the payee was a condition precedent to the obligation of the Government to pay the draft, and the genuine signature of the payee was as necessary as was the signature of the disbursing officer. If the Government paid the draft in reliance on a forged indorsement it would still be liable to make payment of the amount in question to the payee.

In an endeavor to show that the word "forgery" in Section 148 should be construed merely to mean "counterfeiting"—i. e., the unlawful imitation of a genuine instrument—petitioner devotes a substantial portion of his brief to a discussion of statutes antedating the Act of 1864. Most of these statutes were enacted in connection with the issue of particular securities, and generally contained

a provision punishing any making, forging, or counterfeiting thereof "*in imitation of*" the particular instruments referred to. There are no such limiting words in Section 148. That statute is broad and comprehensive, referring generally to all "obligations and securities of the United States." *United States* v. *Owens,* 37 Fed. 112, 113 (C. C., W. D. Tenn.).

We submit that the language of Section 148 shows that Congress was dealing not only with fictitious but also with genuine instruments. While criminal statutes are to be strictly construed, that rule "is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170. Forgery of a payee's endorsement "is as effective a method of defrauding as is the forgery of the name of the drawer" of the instrument. *Hamil* v. *United States, supra.*

The only case decided in connection with the early statutes cited by the petitioner having any direct bearing on the question involved herein is *United States* v. *Stewart,* Fed. Cas. No. 16402 (C. C., Pa.). That case involved the forgery of an endorsement on a note subsequent to that of the payee and arose under Section 18 of the Act of April 10, 1816, c. 44, 3 Stat. 266, 275, which punished the false making, forging, or counterfeiting of any bill or

note "in imitation of or purporting to be a bill or note issued by order of the president, directors and company" of the Bank of the United States, "or of any order or check on the said bank or corporation," and also "altering" any such instrument. While there are expressions in the opinion which are unfavorable to the Government's position herein, the question chiefly discussed was whether the endorsement constituted an "order" on the bank within the meaning of the statute. The court held that it did not, construing the word "order" as having the same meaning as the word "check," with which it was associated in the Act.

Petitioner refers also to several special statutes which punish the forgery of endorsements on specific classes of instruments, which have been enacted since Section 148 of the Criminal Code or the statutes from which it was derived. (Brief, pp. 20–22.) He argues that these statutes show that Congress must have understood that Section 148 did not cover the forging of "endorsements" on such instruments. The statutes in question were parts of legislation dealing comprehensively with particular subjects. (See Act of August 17, 1912, c. 301, 37 Stat. 311; Act of June 8, 1872, c. 335, 17 Stat. 283, 297–300, Section 116 of which subsequently became Section 218 of the Criminal Code.) Petitioner's argument ignores the well-recognized fact that Congress, in legislating with respect to particular subjects, frequently duplicates offenses which are covered by more general legislation.

II

THE INDICTMENT STATES AN OFFENSE UNDER SECTION 29 OF THE CRIMINAL CODE

Section 29 of the Criminal Code provides (pp. 18–19, *infra*):

> Whoever shall falsely make, alter, forge, or counterfeit, * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years.

This provision was taken, with but slight changes, from Section 5421 of the Revised Statutes, which in turn was derived from Section 1 of the Act of March 3, 1823, c. 38, 3 Stat. 771.

The indictment alleges that the petitioner did "falsely make, forge and alter a certain obligation of the United States, to wit: the endorsement on a draft for payment of money, *for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money,* * * *," (Italics ours.) It then sets forth both sides of the draft verbatim, and alleges that the petitioner forged the name of the payee of the draft, "with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148, U. S. C. C.)." (R. 5–7.)

There is a conflict of opinion as to whether Section 29 applies to the forging of the indorsement upon a check or other obligation of the United States, but the decided weight of authority is that the section does so apply. In *Hamil* v. *United States*, 298 Fed. 369, 372 (C. C. A. 5th), *supra*, the court said "we are of opinion that that section does not relate to the forgery of obligations or securities of the United States." And in *United States* v. *Wilson*, Fed. Cas. No. 16,732 (D. Minn.), it was held that the forging of an indorsement upon a genuine check was not covered by the words "or other writing" in the Act of March 3, 1823, *supra*. On the other hand it was decided in *United States* v. *Winters*, 5 F. (2d) 321, 322 (W. D. Wash.), that the forgery of an indorsement of the payee on the back of a Veterans Bureau check was a forgery of an "order" within Section 29. The same view was expressed with reference to Section 5421 R. S. in *United States* v. *Albert*, 45 Fed. 552, 556 (N. D. Fla.). In *De Lemos* v. *United States*, 91 Fed. 497, 499 (C. C. A. 5th), *supra*, the court said that Section 5421 R. S. covered the forging of an indorsement on a valid check, and in *Gesell* v. *United States*, 1 F. (2d) 283, 287–288 (C. C. A. 8th), *supra*, the same conclusion was reached with respect to Section 29 of the Criminal Code. In other cases it has been assumed, apparently as a matter of course, that Section 29 covered the forging of an indorsement upon a check or other obligation

of the United States. *White* v. *Levine*, 40 F. (2d) 502 (C. C. A. 10th), *supra*; *Bailey* v. *United States*, 13 F. (2d) 325 (C. C. A. 9th); *Lewis* v. *United States*, 8 F. (2d) 849 (C. C. A. 8th), *supra*; *Neall* v. *United States*, 118 Fed. 699, 706 (C. C. A. 9th).

We submit that the forging of an indorsement upon a Government check for the purpose of obtaining money from the United States, or officers of the United States, comes within the language of Section 29, which refers to "any deed, power of attorney, order, certificate, receipt, contract, *or other writing.*" This language has been characterized by this Court as "comprehensive" and "all-embracing." *United States* v. *Davis*, 231 U. S. 183, 188. It was early pointed out under a very similar statute,[1] that nothing in its language or in the evils intended to be remedied by the statute indicated that the words "or other writing" were used in a restricted sense. "Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all from which to infer an intention to restrict the effect of the provision to any particular class of writings." *United States* v. *Lawrence*, 13 Blatch. 211 (C. C., S. D. N. Y.). In *Howgate* v. *United States*,

[1] The Act of April 5, 1866, c. 24, 14 Stat. 12, which later became Section 5418 of the Revised Statutes, provided a penalty for the forging of "any bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States."

7 App. D. C. 217, the court said with respect to the words above quoted from Section 29 (p. 233):

> * * * We are not to assume that, because certain classes of writings are specified, we are to regard as surplusage and attach no meaning to the expression "other writings." * * * The language of the statute is broad enough to include all writings whatever of every kind and character, by which the United States could be defrauded; and there would seem to be neither reason nor propriety in giving it any restricted meaning that would destroy its efficacy, when its plain purpose is to prevent fraud upon the United States by the falsification of papers.

In the trial court the petitioner contended that the indictment did not state an offense under Section 29 because it did not allege that the indorsement was forged "with intent to defraud the United States." (R. 52.) Support for this argument is found in *White* v. *Levine*, 40 F. (2d) 502, 503 (C. C. A. 10th), *supra*, wherein it is stated, without discussion, that in an indictment under Section 29 it is necessary to allege that the forgery was done with "intent to defraud the United States." We submit (1) that such an allegation was not necessary in the indictment in the instant case, and (2) that the indictment in substance makes it.

It should be noted that Section 29 (pp. 18–19, *infra*) is divided into three parts. The first part refers to the making of any forged or counterfeit

writing "for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money." The second part refers to the uttering of any such forged or counterfeit writing "with intent to defraud the United States." The third part refers to the transmitting or presenting to any office or officer of the United States of any writing, in support of any claim, "with intent to defraud the United States." Although an intent to defraud the United States is required by the second and third parts of section 29, the first part of the section, and the one upon which the present indictment is based, requires only an intent that the forgery be for the purpose of obtaining or receiving money from the United States or an officer thereof.

In *United States* v. *Barney,* Fed. Cas. No. 14, 524 (C. C., S. D. N. Y.), the court said with respect to Section 1 of the Act of March 3, 1823, *supra:*

> The first branch does not count in express words upon a guilty knowledge, or an intent to defraud the United States, in the forger, for the very obvious reason, that the fabrication of the instrument for the purpose of obtaining money of the United States necessarily implies both. No person could do the act prohibited without both a guilty knowledge and an intent to defraud the government. * * * The terms "for the purpose of obtaining or receiving * * * any sum or sums of money," are descriptive of the char-

acter of the instrument, as well as of the intent of the fabricator.

In *Staton* v. *United States*, 88 Fed. 253, 255 (C. C. A. 8th), the same view was expressed. Numerous cases which have involved Section 29 of the Criminal Code likewise indicate that an indictment under the first part of that section need allege only that the forgery was committed with intent to obtain or receive a sum of money from the United States, or an officer thereof. *Bailey* v. *United States*, 13 F. (2d) 325, 326 (C. C. A. 9th), *supra*; *Lewis* v. *United States*, 8 F. (2d) 849, 850 (C. C. A. 8th), *supra*; *Gesell* v. *United States*, 1 F. (2d) 283, 287 (C. C. A. 8th), *supra*; *United States* v. *Fout*, 123 Fed. 625, 626, 628 (E. D. Mo.).

Moreover, assuming that an indictment under the first part of Section 29 should allege an intent to defraud the United States, we submit that the indictment in the instant case substantially met this requirement.[2] The indictment alleges that the petitioner forged the endorsement on the check in question "for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of

[2] The charge of the trial court to the jury was clearly broad enough to cover the offense created by the first part of Section 29 of the Criminal Code. The court repeatedly advised the jury that the issue of fact which they had to decide was whether the petitioner intentionally endorsed the payee's name on the check "with the intent to defraud the government." (R. 90, 91.) The word "government" could only refer to the United States.

money." (R. 5.) It further alleges an intent "to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148 U. S. C. C.)." (R. 6–7.)

CONCLUSION

We respectfully submit that the judgment of the court below should be affirmed.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 147 of the Criminal Code (U. S. C., Title 18, Sec. 261), provides in part as follows:

> The words "obligation or other security of the United States" shall be held to mean all * * * checks, or drafts for money, drawn by or upon authorized officers of the United States * * *.

Section 148 of the Criminal Code (U. S. C., Title 18, Sec. 262), provides:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Section 29 of the Criminal Code (U. S. C., Title 18, Sec. 73), provides as follows:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered

or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years.

U. S. GOVERNMENT PRINTING OFFICE: 1931